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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, **Plaintiff and Respondent,** **v.** **ADEBOLA ISIAKA AIYEDOGBON,** **Defendant and Appellant.**	**A103934** **(San Mateo County Super. Ct. No. SC-052631)**

Adebola Isiaka Aiyedogbon (appellant) appeals his conviction by jury trial of attempted murder (Pen. Code, §§ 664, 187, subd. (a)) (count 1); forcible rape (§ 261, subd. (a)(2)) (count 2); forcible oral copulation (§ 288a, subd. (c)(2)) (count 3); and corporal injury on a former spouse (§ 273.5, subd (a)) (count 4). The jury found true premeditation and great bodily injury allegations as to count 1 (§§ 189, 12022.7, subd. (a)).[1] In a bifurcated trial, the jury found true two prior conviction allegations, one of which was alleged as a qualifying prior under the "one strike" law (§ 667.61, subd. (d)(1)) and the "habitual sexual offender" law (§ 667.61, subd. (a)), both of which were alleged as qualifying priors under the "three strikes" law (§ 1170.12, subd. (c)(2)). The jury also found that appellant served two prior prison terms (§ 667.5, subd. (b)).[2]

[1] The jury found not true allegations of great bodily injury as to counts 2 and 3.

[2] Defendant was sentenced to 175 years to life in state prison.

Appellant raises claims of evidentiary, instructional and sentencing error. We reject these contentions and affirm.

BACKGROUND

Appellant and the victim, Toyin B., were married in Nigeria in 1983 and had two sons, ages 12 and 13 at the time of trial. Appellant came to the United States in 1983, followed four years later by the victim. In 1993, appellant pled guilty to rape and was sent to prison. In 1994, the victim divorced appellant but remained in a "romantic relationship" with him through 2002. In 1996, she married Eric B. and then separated from him in 2002. In approximately November 2001, appellant moved back in with the victim and their children. The victim did not intend to reunite with or remarry appellant, but permitted him to move in with them for the sake of the children and until he could "get [back] on his feet." After moving back in, appellant beat the victim on a daily basis. She did not call the police because appellant was on parole and she did not want him to go to prison. Despite his abusive behavior, the victim continued to have consensual sex with him.

On September 28, 2002, the victim met Dennis Cowen at a gas station near her house. He flirted with her and she told him she was looking for a job and thought he might help her find one. They agreed to meet that evening at a restaurant and she would bring her paperwork. Before going to meet Cowen, the victim told appellant she was going out and would return soon. When the victim arrived at the restaurant, she called Cowen and they agreed to meet at a different restaurant, the Peppermill.

While Cowen and the victim were seated at the Peppermill and about to eat, the victim saw appellant and told Cowen of his presence. Appellant then approached the victim and in their Yoruba language, said, "Is this where you're coming to?" and she replied affirmatively. Appellant then said to Cowen, "You don't know who you're messing with. I'm F.B.I." The victim explained to Cowen that appellant was not her current, but her ex-husband. After appellant left the table, a waitress told Cowen and the victim that appellant offered to buy them a drink, which they refused. Appellant appeared to be very angry and a waitress walked him out of the restaurant. As the victim

left the restaurant and entered her car, appellant drove up behind her. When she stopped, he exited his car and approached her with something in his hand. The victim then drove away and appellant reentered his car. Concerned about Cowen's safety, the victim drove to the back of the Peppermill and called him. She then saw appellant standing in front of Cowen's car and Cowen said appellant would not let him leave. Subsequently, Cowen left the parking lot and he and the victim went to a bar for a drink.

When the victim arrived home at about 2:00 a.m., appellant was there. As she left her sons' bedroom after looking in on them, appellant grabbed, kicked and dragged her to the master bedroom saying, "I'm killing you tonight. You die tonight." He then locked the bedroom door. Afraid for her safety, the victim ran into the bathroom and locked the door. As she was changing into her nightgown appellant demanded that she come out or he would knock down the door. When she opened the door he grabbed her by the throat and began beating her with his fists and pulling her hair. She scratched him in an attempt to defend herself. He continued threatening to kill her and said he would kill her if she opened the door. At one point he choked her and she passed out until he began kicking her in the ribs. At another point when appellant left the bedroom, the victim tried to use the phone to record a message about what was happening. However, appellant returned, continued to threaten to kill her and again rendered her unconscious. When the victim regained consciousness they continued struggling. He removed his clothes, pushed her onto the bed, removed her clothes and raped her while his elbow was on her throat. He forced her to orally copulate him and struck her when she tried to get up. He then used a necktie to tie them together while he slept.

Later that morning, the victim's pastor, James Eli, called as he usually did on Sunday mornings, and the victim asked to speak with Eli's wife, Kim West-Eli. Appellant ordered her not to say anything about what had happened. The victim told West-Eli that she was coming to see her, and appellant let her leave to avoid arousing West-Eli's suspicion. Appellant directed the victim to wear a turtleneck and makeup to cover the injuries he inflicted to her neck, eyes and forehead. She also suffered injuries to her hand and leg.

When the victim arrived at Eli's house, they immediately saw she was injured and persuaded her to call the police. She reported the incident to the police who transported her to the hospital for treatment. When the victim returned home from the hospital, appellant was not there. After that he wrote her many letters and called her several times. In one phone call, appellant told her in Yoruba not to cooperate with the prosecution. In another phone call which was recorded, transcribed, and translated for the jury, appellant admitted to the victim that he strangled her.

The victim admitted being convicted of possessing stolen property in 1991, pleading guilty to welfare fraud sometime between 1999 and 2002, and pleading guilty to theft in 2000. On cross-examination, she admitted that on one occasion she slapped appellant in front of Pastor Eli and on another occasion bit appellant on the back in self-defense.

Eli testified he had known appellant and the victim since 2001 and they had discussed their marital problems with him. On one occasion Eli went to their home after they called to report an argument. When Eli arrived, appellant angrily complained that the victim had "messed up" his life and he could not start a business. He began beating his chest and saying, "You're going down." Appellant told Eli that if the victim died, he would not care and would "just smoke a cigarette." Eli opined that appellant believed he was still married to the victim and was concerned about her spending time with other men. Eli said that when the victim arrived at his home on the morning after the charged offenses she was "hysterical" and had bruises on her eyes, neck and chest. She told Eli about what took place at the Peppermill and that, thereafter, appellant had choked her till she lost consciousness and raped her.

South San Francisco Police Officer Adam Plank interviewed the victim at Eli's home and transported her to the hospital. He described the victim as crying and shaking, with bruising around her eye and neck and a cut on her lower lip. The victim told him she had been raped and assaulted by appellant and that appellant threatened to kill her while choking her.

Nurse Sally Thresher performed a sexual assault examination on the victim following the incident. The victim appeared to be in a state of shock and had significant bruising around her neck and on her eyelids. The victim said that in the course of the assault and rape appellant hit her with a fist, struck her with a metal candle holder, body slammed her against the wall and choked her twice. The victim said she was also repeatedly forced to orally copulate appellant. Thresher's physical findings were consistent with the history given by the victim. The victim told Thresher that in the course of trying to fend off appellant's attack, she scratched him, breaking off two acrylic fingernails. A forensic examination of appellant following the assault revealed two small, fresh abrasions to his face consistent with being scratched by a fingernail.

Shortly after the incident, the victim gave consistent versions of the assault and rape, and the events leading up to it, to friends Moruf Oladapo and Wasiu Olowo. When Oladapo and Olowo visited appellant in jail to get his side of the story, appellant said he and the victim had argued but he denied doing anything to her. He suggested that the victim may have injured her neck with an iron.

Forensic pathologist Peter Benson testified it takes between four and six minutes for strangulation to result in death, but seconds to result in unconsciousness. Dr. Benson opined that the petechial hemorrhages to the victim's eyelids and the bruising of her neck were consistent with multiple efforts at strangulation. Her injuries were not consistent with self-infliction with an iron.

In 1992, L.M. applied for a job at a Daly City store owned or run by appellant. After submitting her application to appellant, he asked her to return for an interview. At the end of the interview she heard what sounded like the door being locked. Appellant returned to where she was seated and asked her to have sex with him. After she replied, "Hell no," he grabbed her forcibly from behind, pulled off her pants, removed his own clothes and raped her from behind. In the course of the assault he grabbed her around the neck to restrain her.

Finally, the prosecution introduced a recorded telephone conversation made by appellant to Toyin B. while he was in jail in which he admitted he had "offended" and "strangled" her.[3]

The Defense

Testifying in his own defense, appellant denied raping L.M. Instead, he testified that after her third visit to his store they had consensual sex in the motel where she lived, after which she asked him for a pager, $400 or a job. However, appellant admitted that in August 1993 he pled guilty to raping L.M. Upon his release from prison in October 1994, he resumed living with Toyin B. Appellant testified that in 1996 he pled guilty to burglary and theft and was incarcerated until April 1999. He was then placed in immigration detention until August 2001 when he resumed living with Toyin B. Appellant said that while he was in custody he was unaware that the victim had divorced him and remarried.

Appellant denied ever hitting the victim. He said on one occasion in late 2001, when he tried to take her purse containing illegal drugs away from her, she bit him on his back. The next day she punched him with her fist and bit him on his lip.

According to appellant, on the night of the incident, the victim left the house shortly before 8:00 p.m. without telling him where she was going. He later went to the Peppermill for a drink. He noticed the victim's car in the parking lot and went inside the restaurant. As he later left the restaurant, he saw the victim and a man seated together. He approached them, said she was his wife, showed the man a picture of her and their children, and told the man not to believe her lies. After they rejected his offer of a drink, appellant left the restaurant. When he saw the man leave the restaurant, appellant approached the man to introduce himself and they talked. Appellant denied threatening the man or blocking his car. Appellant then saw the victim drive by and he drove home.

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[3] The conversation, which was transcribed and translated into English, was admitted into evidence.

Appellant said that when the victim got home she slammed the door and went into their bedroom. He denied dragging her into the bedroom. After changing into her nightgown she appeared to be very angry, shaking her arms and asking him why he had followed her. He took her arm in an effort to calm her down and she laid on his chest. He was scratched while trying to calm her down. The victim then told him she was depressed because she had been fired from her job and they had bills to pay. After she calmed down they had consensual intercourse and oral sex. He denied choking, striking or kicking her. When she left home early the next morning she had no injuries.

Appellant acknowledged writing a letter to the victim from prison in violation of the restraining order against him. He denied admitting in the recorded phone conversation that he strangled her, and said the translation from Yoruba was incorrect. Instead, he said he asked her in surprise, "Did I choke you?"

On rebuttal, Daly City Police Officer David Boffi testified that when he interviewed appellant about the rape of L.M., appellant denied knowing L.M. and having sex with her.

DISCUSSION

I. *Evidence Code Section 1108 Does Not Violate Due Process*

Appellant contends the trial court violated his federal constitutional rights to due process by admitting evidence of his 1992 rape of L.M. under Evidence Code section 1108.[4] He concedes he did not object to admission of the L.M. rape evidence on this ground below, and argues that the omission constituted ineffective assistance of counsel. In the interests of justice and to avoid an incompetence of counsel claim, we address the due process claim on the merits.

In *People v. Falsetta* (1999) 21 Cal.4th 903, 907, 922, our Supreme Court rejected a due process challenge to Evidence Code section 1108. We disagree with appellant's

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[4] Evidence Code section 1108, subdivision (a) provides: "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352."

assertion that *Falsetta* based its due process holding solely on state constitutional grounds. *Falsetta* discussed *People v. Fitch* (1997) 55 Cal.App.4th 172 which rejected a federal due process challenge to section 1108. (*Falsetta*, at pp. 918-919.) *Falsetta* also noted that section 1108 was modeled on Federal Rules of Evidence rules 413 and 414, and that federal courts have rejected due process challenges to those rules. (*Falsetta*, at pp. 912, 920.) It also expressly ruled inapposite *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, relied on by appellant, because it "did not concern the validity of section 1108 or federal rule 413 or 414, nor even involve the admission of evidence of the defendant's other crimes." (*Falsetta*, at pp. 921-922.) *Falsetta* concluded "consistent with prior state and federal case law, that section 1108 survives defendant's due process challenge." (*Falsetta*, at p. 922.) Under principles of stare decisis (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455), we are bound by the Supreme Court's holding in *Falsetta*.

II. *Evidence Of the Prior Rape Was Properly Admitted Under Evidence Code Section 1108*

Next, appellant contends the court abused its discretion under Evidence Code section 352[5] in admitting evidence of the 1992 rape under section 1108.

The prosecution moved in limine to permit evidence of the 1992 rape of then 20-year-old L.M. under Evidence Code sections 1101 and 1108. The prosecution asserted that L.M. would testify that at the end of the job interview, appellant locked the door to the store, told her he wanted to tell her more about the job and had her accompany him to the back office. Once there, he asked if he could "stick it between [her] legs." When she said, "Hell No!," he pushed her over a chair, pulled her pants down, raped her and used his hand to prevent her from screaming. She reported the rape three days later. Appellant opposed the motion on the grounds that the prior rape evidence was too

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5 Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

dissimilar to establish intent, was remote in time and its prejudicial effect outweighed its probative value.

At the hearing on the motion, defense counsel argued that the nonviolent L.M. rape was dissimilar to the charged offenses, which were committed with violence and almost resulted in the victim's death. The court rejected appellant's contentions and admitted the evidence under Evidence Code section 1108.

Evidence of a defendant's propensity to commit the charged crime is generally inadmissible. (Evid. Code § 1101.) Section 1108 creates an exception to this general rule and permits the trier of fact to consider a defendant's prior uncharged sex offenses as propensity evidence. (*People v. Falsetta, supra,* 21 Cal.4th at pp. 911-912; *People v. Pierce* (2002) 104 Cal.App.4th 893, 897.) In enacting section 1108, the Legislature determined that evidence of uncharged sex offenses is so uniquely probative in sex crime prosecutions that it is presumed admissible without regard to the limitations of section 1101. (*People v. Yovanov* (1999) 69 Cal.App.4th 392, 405.) The admissibility of such propensity evidence under section 1108 is subject to the trial court's weighing process under section 352. In conducting its weighing process, the court must consider factors such as the nature and relevance of the prior offense, its remoteness and similarity to the charged offense, the degree of certainty of its commission, the likelihood it will confuse, mislead, or distract the jury, its inflammatory or prejudicial impact and the availability of less prejudicial alternatives to its admission, such as admitting some but not all of the defendant's prior sex offenses or excluding irrelevant, but inflammatory details surrounding the offense. (*Falsetta*, at pp. 916-917.) The trial court has broad discretion in conducting the weighing process under section 352, and that discretion will be reversed on appeal only if its exercise was " 'arbitrary, whimsical or capricious as a matter of law. [Citation.]' [Citation.]" (*People v. Branch* (2001) 91 Cal.App.4th 274, 282.)

Appellant contends the L.M. rape was "far more prejudicial than probative" because it was dissimilar to and remote in time from the offenses for which he was on trial. He emphasizes the following distinctions: First, the prior rape involved the rape of

a young job applicant, whom he had met once before; the charged offenses were committed against his ex-wife,[6] with whom he was living and having a sexual relationship. Second, the prior rape occurred in the back room of appellant's store; the charged offenses occurred in the bedroom appellant shared with the victim who was dressed in a nightgown and had just returned from an apparent date with another man. Appellant argues that the probative value of the L.M. rape was minimal because it had no bearing on the issue of consent, the primary issue in the instant case.

To be admissible under Evidence Code section 1108, a prior sex offense need not be so similar as to give rise to an inference of a non-character purpose under section 1101. (*People v. Soto* (1998) 64 Cal.App.4th 966, 984.) "The charged and [prior offenses] need not be sufficiently similar that evidence of the latter would be admissible under . . . section 1101, otherwise . . . section 1108 would serve no purpose." (*People v. Frazier* (2001) 89 Cal.App.4th 30, 40-41.) The prior and charged offenses are sufficiently similar if they both are sexual offenses as defined in section 1108. (*Frazier*, at p. 41.)[7]

Despite the distinguishing fact that the charged sex offenses were committed with great violence,[8] we conclude that the L.M. rape was sufficiently similar to the charged offenses. First, both the prior and current offenses involved rape, an offense defined in Evidence Code section 1108. Second, in both cases, appellant locked the door to prevent his female victims from leaving. Third, in the prior case appellant committed the rape while using his hand to prevent L.M. from screaming, and in the charged case he

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[6] The victim's trial testimony established that she was about 38 or 39 years old at the time of the charged offenses.

[7] In *People v. Reliford* (2003) 29 Cal.4th 1007, 1012, footnote 1, the Supreme Court noted that it was not presented with, and did not decide, whether uncharged sex acts must be similar to the charged offenses in order to support the inference of a defendant's propensity to commit other sex offenses.

[8] That evidence of the prior rape was no stronger and not nearly as inflammatory as the evidence of the charged offenses suggests that the prejudicial impact of the prior rape on

committed the rape while having his hand and elbow on the victim's throat. Any dissimilarity between the L.M. prior rape and the charged offenses went to the weight, not the admissibility of L.M.'s testimony. (*People v. Mullens* (2004) 119 Cal.App.4th 648, 660.)

We also reject appellant's claim that because the prior rape occurred 10 years before the charged offenses it was too remote. The passage of a substantial length of time does not automatically render a prior incident inadmissible, and no specific time limits have been established in determining when a prior offense is too remote. (*People v. Branch, supra,* 91 Cal.App.4th at p. 284; *People v. Soto, supra,* 64 Cal.App.4th at p. 991; see also, e.g., *People v. Ewoldt* (1994) 7 Cal.4th 380, 405 [conduct 12 years earlier not too remote]; *People v. Waples* (2000) 79 Cal.App.4th 1389, 1395 [child molestation 20 years prior not too remote in kidnapping and child molestation case].) Theoretically, a substantial gap between the prior offense and the charged offenses means it is less likely that the defendant had the propensity to commit the charged offenses. (*Branch*, at p. 285.) However, in this case, as the trial court noted, appellant was incarcerated during much of the 10-year gap between offenses and committed the charged offenses about a year after his release from custody.[9]

We conclude the trial court sufficiently analyzed the relevant factors under Evidence Code section 352 and acted within its broad discretion in admitting evidence of the prior L.M. rape after determining its probative value outweighed any prejudical effect.

III. *CALJIC No. 2.50.01 Is Not Unconstitutional*

Appellant next contends that the court's jury instruction pursuant to the 2002 version of CALJIC No. 2.50.01[10] violated his federal rights to due process and a fair trial.

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the jury was minimal. (See *People v. Branch, supra,* 91 Cal.App.4th at pp. 283-284; *People v. Harris* (1998) 60 Cal.App.4th 727, 737-738.)

[9] Appellant was released from prison in April 1999 and thereafter held in immigration detention until the end of August 2001.

[10] CALJIC No. 2.50.01, the instruction given to the jury, provided:

In particular, he argues that the instruction given: (1) permitted the jury to consider the prior rape as evidence of his propensity to commit the charged sex offenses; (2) permitted the jury to use the propensity evidence to find that he committed the charged sex offenses; and (3) authorized the jury to convict him of the charged offenses based on a preponderance of the evidence.

Appellant concedes that he failed to object to the challenged instruction below, but argues the error is not waived pursuant to Penal Code section 1259. That section provides that we may review "any instruction given, refused or modified, even though no objection was made thereto" in the trial court. (§ 1259.) However, the record indicates that in addition to failing to object to the instruction given, appellant included CALJIC No. 2.50.01 in his list of proposed jury instructions. The record does not establish that appellant ever withdrew that request. By requesting the CALJIC No. 2.50.01 instruction, appellant is precluded from challenging it on appeal. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1223; *People v. Williams* (1980) 102 Cal.App.3d 1018, 1025.)

"Evidence has been introduced for the purpose of showing that the defendant engaged in a sexual offense other than that charged in this case.

" 'Sexual offense' means a crime under the laws of a state or of the United States that involves:

"Any conduct made criminal by Penal Code section 261[, subdivision] (a)(2), rape. The elements of this crime are set forth elsewhere in these instructions.

"If you find that the defendant committed a prior sexual offense, you may, but are not required to, infer that the defendant had a disposition to commit sexual offenses. If you find that the defendant had this disposition, you may, but are not required to, infer that he was likely to commit and did commit the crime of rape of which he is accused in this case.

"However, if you find by a preponderance of the evidence that the defendant committed a prior sexual offense, that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crime of rape. If you determine an inference properly can be drawn from this evidence, this inference is simply one item for you to consider, along with all other evidence, in determining whether the defendant has been proved guilty beyond a reasonable doubt of the charged crime. Unless you are otherwise instructed, you must not consider this evidence for any other purpose."

Even assuming appellant's instructional error claim is not waived, it fails on the merits. In *Reliford*, our Supreme Court rejected the same federal due process arguments asserted here to the 1999 version of CALJIC No. 2.50.01. (*People v. Reliford, supra,* 29 Cal.4th at pp. 1011-1016.) In dicta, the court stated that the 2002 revision of CALJIC No. 2.50.01, as given in this case, is an improvement because it "provides additional guidance on the permissible use of the other-acts evidence and reminds the jury of the standard of proof for a conviction of the charged offenses." (*Reliford*, at p. 1016.)[11] Although dicta, *Reliford's* statement regarding the 2002 revision of CALJIC No. 2.50.01 is "highly persuasive" and it is improbable that the Supreme Court would determine that the instruction given here was unconstitutional after rejecting a due process challenge to the 1999 version of the instruction. (*People v. Brown* (2000) 77 Cal.App.4th 1324, 1336.)[12]

IV. *Appellant Was Properly Sentenced As A Habitual Sexual Offender*

Appellant contends his consecutive sentencing on counts 2 and 3 under the habitual sexual offender law (Pen. Code,[13] § 667.71) was improper. We agree with the People's assertion that appellant has waived these specific claims on appeal by not raising them below. (See *People v. Murphy* (2001) 25 Cal.4th 136, 156; *People v. Scott* (1994) 9 Cal.4th 331, 356.) Despite such waiver, we address his sentencing claims on the merits.

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11 The 2002 revision of CALJIC No. 2.50.01 deleted the sentence "The weight and significance of the evidence, if any, are for you to decide," and inserted the cautionary sentence, "If you determine an inference properly can be drawn from this evidence, this inference is simply one item for you to consider, along with all other evidence, in determining whether the defendant has been proved guilty beyond a reasonable doubt of the charged crime." (*People v. Reliford, supra,* 29 Cal.4th at p. 1016.)

12 In his reply brief appellant relies on *Gibson v. Ortiz* (9th Cir. 2004) 387 F.3d 812 in support of his contention that CALJIC No. 2.50.01, the instruction given here, violated his rights to federal due process. However, that case reviewed a 1996 version of CALJIC No. 2.50.01 and is therefore inapposite. (*Gibson*, at p. 817.)

13 All further undesignated section references are to the Penal Code.

A. *The Sentence Imposed*

The second amended information alleged, and the jury found, that appellant was previously convicted of rape (§ 261, subd. (a)(2)), and committing a lewd and lascivious act with a child under age 14 (§ 288, subd. (a)). The prior rape and the lewd and lascivious act convictions were alleged as strikes under the three strikes law (§ 1170.12, subd. (c)(2)). The prior rape conviction was also alleged as a qualifying prior under the one strike law (§ 667.61, subd. (d)(1)) and the habitual sexual offender law (§ 667.71, subd. (a)).

The court sentenced appellant to 175 years to life as follows: (1) 25 years to life on the count 1 attempted murder under the three strikes law based on the two prior strikes; (2) 25 years to life on the count 2 forcible rape under the habitual sexual offender law, tripled under the three strikes law; (3) 25 years to life on the count 3 forcible oral copulation under the habitual sexual offender law, tripled under the three strikes law; (4) three years (midterm) on the count 4 domestic violence, stayed under section 654; and, (5) sentenced appellant consecutively on counts 2 and 3 under section 667.6, subdivision (c).[14]

B. *The Statutory Scheme*

Under the habitual sexual offender law, a defendant who has a prior conviction of one or more of the statutorily enumerated sex offenses and who is convicted in the present proceeding of one of those offenses is a habitual sexual offender punishable by a term of 25 years to life. (§ 667.71) Since appellant was convicted of one of the specified offenses, forcible rape, and was previously convicted of that offense, he was eligible for a term of 25 years to life under the habitual sexual offender law. (§ 667.71, subd. (c)(2).)

Under the one strike law, a defendant convicted of a specified sex offense must be punished by imprisonment in state prison for life and is not eligible for release on parole for 25 years if he or she committed an offense specified in subdivision (c) of section

[14] On the People's motion, the great bodily injury enhancement on count one (§ 12022.7, subd. (a)) and the two prior prison enhancements (§ 667.5, subd. (b)) were dismissed.

667.61 under one or more of the circumstances specified in subdivision (d), or under two or more of the circumstances specified in subdivision (e). (§ 667.61, subd. (a); *People v. Hammer* (2003) 30 Cal.4th 756, 761.) If the defendant committed the specified offense under only one of the circumstances specified in subdivision (e) of that section, he or she must be subject to life imprisonment and is not eligible for release on parole for 15 years. (§ 667.61, subd. (b).) Appellant was convicted of one of the specified offenses, forcible rape, under the circumstance specified in subdivision (d)(1) of section 667.61 in that he had previously been convicted of the same specified offense. He was thus eligible for a life sentence under that provision of the one strike law prohibiting release on parole for at least 25 years. (§ 667.61, subd. (a).)

Under the three strikes law, a defendant, such as appellant, who is convicted of a felony and who has two or more qualifying prior felony convictions (strikes) must be sentenced to an indeterminate term of life imprisonment with the " 'minimum term of the indeterminate sentence' being the greatest of three options," one of which is " '[t]hree times the term otherwise provided as punishment for each current felony conviction subsequent to the two or more prior felony convictions.' " (*People v. Acosta* (2002) 29 Cal.4th 105, 108-109.) Since appellant was convicted of felony offenses and had two qualifying prior strikes he was eligible for this sentencing option under the three strikes law.

C. *No Abuse Of Discretion In Sentencing Appellant As A Habitual Sex Offender*

Appellant contends the court's discretionary decision to sentence him under the habitual sexual offender law rather than the one strike law was not supported by legally valid reasons.

In exercising its discretion to sentence appellant under the habitual sexual offender law rather than the one strike law the court stated, "In view of [appellant's] criminal history, including prior offenses for violent rape and lewd and lascivious conduct with a child under the age of 14, committed on separate victims on separate occasions, the court will exercise its discretion in favor of sentencing [appellant] under the more stringent provisions of . . . section 667.71. [¶] Accordingly, on count 2, [appellant] is sentenced to

a term of 25 years to life under the provisions of . . . section 667.71, which is tripled under the provisions of the three strikes legislation, for a total term on count 2 of 75 years to life in state prison. [¶] On count 3, the jury found [appellant] guilty of oral copulation by means of force[,] violence and/or fear in violation of . . . section [288a, subdivision (c)(2)]. For the reasons stated with respect to count 2, and in view of the holdings . . . in [*Murphy* and *Acosta*], the court will exercise its discretion and sentence [appellant] under the provisions of . . . section 667.71. [¶] Accordingly, on count 3, [appellant] is sentenced to a term of 25 years to life under the provisions of . . . section 667.71, which is tripled again under the provisions of the three strikes legislation, for a total term on count 3 of 75 years to life in state prison."

Appellant provides no authority for the proposition that a trial court is required to state its reasons for imposing an indeterminate term pursuant to the habitual sexual offender law rather than pursuant to the one strike law. "Section 1170, subdivision (c), which requires the trial court to 'state the reasons for its sentence choice on the record at the time of sentencing,' applies only to sentences imposed pursuant to section 1170, i.e., determinate sentences." (*People v. Arviso* (1988) 201 Cal.App.3d 1055, 1058.) Appellant was sentenced pursuant to section 1168, subdivision (b), which makes no reference to a statement of reasons. (*Arviso*, at p. 1058.) Similarly, California Rules of Court, rule 4.403 provides that the sentencing rules "apply only to criminal cases in which the defendant is convicted of one or more offenses punishable as a felony by a determinate sentence imposed pursuant to chapter 4.5 (commencing with section 1170) of Title 7 of Part 2 of the Penal Code." (See also, Advisory Com. com., 23 pt. 2 West's Ann. Codes (2004 supp.) foll. rule 4.403, p. 79 ["sentencing rules do not apply to offenses carrying a life term or other indeterminate sentences for which sentence is imposed under section 1168(b)"].) Thus, a trial court may impose an indeterminate term under a particular sentencing scheme without providing any statement of reasons. Even assuming the court stated improper reasons for sentencing appellant pursuant to the habitual sexual offender law, remand for resentencing is unnecessary unless the court's sentence choice was an abuse of discretion. (*Arviso*, at p. 1058.)

The habitual sexual offender law and the one strike law have separate objectives. The purpose of the habitual sexual offender law is to target recidivism by imposing a life term for repeat sexual offenders. (*People v. Hammer, supra,* 30 Cal.4th at pp. 766, 768; *People v. Murphy, supra,* 25 Cal.4th at p. 155.) The purpose of the one strike law is to provide life sentences for aggravated sex offenders, even if they do not have prior convictions. (*People v. Acosta, supra,* 29 Cal.4th at p. 127.) Although a trial court is authorized to sentence a defendant cumulatively under the one strike law and the three strikes law (*Acosta*, at pp. 118-128) or under the habitual sexual offender law and the three strikes law (*Murphy*, at pp. 154-159), the one strike law and the habitual sexual offender law are *alternative* sentencing schemes for specified sex offenses. (*People v. Snow* (2003) 105 Cal.App.4th 271, 281-282; accord, *People v. Lopez* (2004) 119 Cal.App.4th 355, 360.) The decision as to whether to impose the one strike law or the habitual sexual offender law is within the reasonable discretion of the trial court. (*Snow*, at p. 282.)

A court's sentencing discretion is very broad, is accorded great weight on appeal and will not be reversed absent a clear abuse or departure from the law. (*People v. Giminez* (1975) 14 Cal.3d 68, 72; *People v. Marquez* (1983) 143 Cal.App.3d 797, 803; *People v. Buford* (1974) 42 Cal.App.3d 975, 985.) We conclude that no abuse of discretion is demonstrated. In contending that the court abused its discretion in sentencing him pursuant to the habitual sexual offender law instead of the one strike law, appellant impliedly concedes that the court was required to sentence him under one of those two alternative sentencing schemes. Since appellant was a recidivist sex offender, the court properly exercised its discretion to sentence him under the sentencing scheme whose purpose is to target such sex offenders.

D. *Consecutive Sentencing On Counts 2 And 3 Was Not An Abuse Of Discretion*

Next, appellant contends the court erred in sentencing him consecutively on counts 2 and 3 because the court's stated reasons for doing so were invalid.

After determining pursuant to section 667.6, subdivision (d) that counts 2 and 3 did not occur on separate occasions,[15] the court gave the following reasons for its discretionary decision to sentence appellant consecutively on those counts under section 667.6, subdivision (c): (1) crimes in counts 2 and 3 involved great violence and disclosed a high degree of viciousness on the part of appellant; (2) the victim was particularly vulnerable in terms of her relative size and strength when compared to that of appellant and by virtue of the fact that appellant trapped and held her in her own bedroom; (3) appellant engaged in violent conduct which indicated that he constitutes a serious danger to his former wife and to society in general; (4) appellant had served prior prison terms; and (5) there are no mitigating factors.

The trial court was not required to state reasons for imposing consecutive indeterminate terms on counts 2 and 3. (*People v. Arviso, supra,* 201 Cal.App.3d at p. 1058.) Its decision to impose consecutive indeterminate terms is subject to review for abuse of discretion. (*Arviso*, at pp. 1058-1059.) Appellant does not contest one of the five factors relied on by the court—that he engaged in violent conduct indicating that he is a serious danger to the victim and to society. (Cal. Rules of Court, rule 4.421(a)(1).) Thus, even assuming the invalidity of any of the other reasons given for the court's consecutive sentencing choice, no abuse of discretion is demonstrated. In exercising its sentencing discretion the court can balance aggravating and mitigating factors qualitatively as well as quantitatively, and a single aggravating factor is sufficient to justify the court's sentencing choice. (*People v. Lamb* (1988) 206 Cal.App.3d 397, 401.)

E. *The Jury Made The Necessary Factual Findings Under Section 667.71*

In reliance on *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 and *Blakely v. Washington* (2004) __U.S.__ [124 S.Ct. 2531], appellant argues that he was improperly sentenced as a habitual sex offender under section 667.71 because the jury did not make

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[15] Section 667.6, subdivision (d) provides for mandatory consecutive sentences for specified sex offenses committed on separate occasions.

the necessary findings to impose sentence under that section.[16] *Apprendi* and *Blakely* stand for the proposition that a trial court may not rely on facts that were neither admitted by the defendant nor found true by the jury to increase the sentence for a particular offense beyond the maximum statutory penalty for that offense. (See *Blakeley*, at p. ___ [at p. 2537] [statutory maximum pursuant to *Apprendi* is sentence judge may impose solely on basis of facts reflected in jury verdict or admitted by defendant].)

Section 667.71 provides, in part: "(a) For the purpose of this section, a habitual sexual offender is a person who has been previously convicted of one or more of the offenses listed in subdivision (c) and who is convicted in the present proceeding of one of those offenses. [¶] . . . [¶] (d) This section shall apply only if the defendant's status as a habitual sexual offender is alleged in the information, and either admitted by the defendant in open court, or found to be true by the jury trying the issue of guilt or by the court where guilt is established by a plea of guilty or nolo contendere or by trial by court sitting without a jury."

In this case, the information alleged as to counts 2 and 3 that appellant "pursuant to . . . section 667.71[, subdivision] (a)" was previously convicted of section 261, subdivision (a)(2), a qualifying prior under section 667.71. The jury verdict form stated that the jury found "the special allegations against [appellant] that he was previously convicted of the following felony offenses: [¶] (1) Rape, . . . section 261(a)(2), San Mateo County, Case Number C30847A (1993), to be TRUE." (Underscoring in original.)

Appellant's argument appears to be that his sentence under section 667.71 is invalid because the jury did not expressly find that he had the "status as a habitual sexual offender." We conclude, that neither *Apprendi* nor *Blakely* apply to appellant's life sentences under section 667.71 because the jury made the two factual findings necessary for application of the habitual sex offender statute: (1) it convicted him of forcible rape

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16 The trial court rejected this argument at sentencing, which was based solely on *Apprendi*.

and forcible oral copulation, both of which were qualifying offenses under section 667.71; and (2) found true the allegation that he had previously been convicted of forcible rape. No other factual findings were necessary to sentence appellant as a habitual sex offender. The "statutory maximum" for each section 667.71 count was 25 years to life based solely on the facts reflected in the jury's verdict. Since the court did not exceed this statutory maximum, there was no *Apprendi* or *Blakely* violation.

V. *No Due Process Or Ex Post Facto Violation*

Next, appellant contends that treating his two 1993 felonies as separate strikes rather than as a single strike under the three strikes law, violated his rights under the due process and ex post facto clauses of the federal Constitution. He concedes he failed to raise this issue below and argues that his counsel's failure to do so constitutes ineffective assistance of counsel. Once again, although appellant waived the claim by not raising it below, we consider it on the merits.

Appellant's two prior strikes for rape and for committing a lewd and lascivious act on a child under age 14 were committed on separate occasions against different victims, but were brought and tried together in 1993. In that case, appellant pled nolo contendere to the two felonies as well and to two misdemeanors. The 1993 pleas were entered prior to the 1994 enactment of the three strikes law. In *People v. Fuhrman* (1997) 16 Cal.4th 930, 933, our Supreme Court held, "a prior qualifying conviction need not have been brought and tried separately from another qualifying conviction in order to be counted as a separate strike." The court reasoned that nothing in the language of the three strikes law requires that prior convictions be brought and tried separately in order to qualify as strikes, and had the Legislature intended such limitation, it would have expressly included it in the statute as it did in section 667, subdivision (a).[17] (*Fuhrman*, at pp. 933, 939.)

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[17] *Furhman* noted that section 667, subdivision (a) is an enhancement statute separate from the three strikes law, and section 667, subdivision (a) specifically provides for imposition of a five-year enhancement for each prior serious felony conviction arising

Appellant contends that retroactive application of *Fuhrman* to qualify his 1993 pleas as two separate strikes violates the due process and ex post facto clauses. He argues that *Fuhrman* retroactively changed the rules as to the effect of pleading guilty to multiple felonies, and that had he known in 1993 when he entered his pleas that the three strikes law would later be construed to exempt the "brought and tried separately" rule, "more probably than not" he would not have "pled to the sheet."

"The prohibitions against ex post facto laws . . . apply only to legislative enactments and not to judicial decisions. [Citations.]" (*People v. Morante* (1999) 20 Cal.4th 403, 430-431. However, "a judicial enlargement of a criminal statute that is not foreseeable, 'applied retroactively, operates in the same manner as an ex post facto law. [Citations.]' [Citations.] Holding a defendant criminally liable for conduct that he or she could not reasonably anticipate would be proscribed, 'violates due process because the law must give sufficient warning so that individuals "may conduct themselves so as to avoid that which is forbidden." [Citations.]' [Citations.]" (*Id*. at p. 431.)

An argument similar to this was made to the three strikes legislation itself and roundly rejected. In those cases, the defendants argued that permitting convictions suffered prior to enactment of the three strikes law to count as strikes would violate the ex post facto clause. (See, e.g., *People v. Sipe* (1995) 36 Cal.App.4th 468, 478-479; accord, *Gonzales v. Superior Court* (1995) 37 Cal.App.4th 1302, 1309.) "Recidivism laws are familiar in California. Such laws have routinely applied to persons with specified prior offenses predating the law's effective date, who commit a new crime after the law takes effect. [Citations.] [¶] Moreover, the constitutionality of 'retroactive' application is well settled. 'In the context of habitual criminal statutes, "increased penalties for subsequent offenses are attributable to the defendant's status as a repeat offender and arise as an incident of the subsequent offense rather than constituting a penalty for the prior offense." [Citation.]' [Citation]." (*Gonzales*, at p. 1309.)

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from " 'charges brought and tried separately.' " (*People v. Furhman, supra,* 16 Cal.4th at p. 939.)

Here, appellant's sentencing pursuant to the three strikes law reflects that he is being punished for his recidivism, not for the 1993 prior convictions. Had he wanted to avoid application of his 1993 priors as strikes, he could have chosen not to commit the 2002 offenses against the victim.[18]

VI. *Appellant's Sentence Was Not Cruel And Unusual*

Appellant argues that the use of his two 1993 prior convictions as separate strikes constitutes cruel and unusual punishment under the federal Constitution because both strikes came from the same court proceeding, he served only one prison term for those strikes and only had one opportunity for rehabilitation thereafter.[19]

In order to establish that his sentence constitutes cruel and unusual punishment under the federal Constitution, a defendant must show that the term imposed is grossly disproportionate to his offense. (*Lockyer v. Andrade* (2003) 538 U.S. 63; *Ewing v. California* (2003) 538 U.S. 11.) In *Andrade* the United States Supreme Court upheld against a cruel and unusual punishment challenge two consecutive 25-year-to-life terms for shoplifting about $150 in videotapes. (*Andrade*, at pp. 70, 77.) In *Ewing,* it held that a 25-year-to-life sentence for stealing three golf clubs each valued at about $400 did not establish the requisite disproportionality required for an Eighth Amendment violation. (*Ewing*, at pp. 28, 30-31.)

Although appellant received a longer term than the terms imposed in *Andrade* and *Ewing,* his offenses were considerably more serious in that he forcibly raped his ex-wife, forced her to orally copulate him and tried to kill her. He also has a serious and extensive

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18 Appellant relies on *People v. Yartz* (rev. granted Sept. 24, 2003, S117964) and *McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467 for his ex post facto argument. However, these cases are inapposite. *Yartz* considered the retroactive use of a no contest plea in a Sexually Violent Predator Act proceeding. *McClung* considered the retroactivity of an amendment to the Fair Employment and Housing Act (Gov. Code, § 12900 et seq.) in a hostile work environment action.

19 Once again, the claim is waived due to appellant's failure to raise it below. (*People v. DeJesus* (1995) 38 Cal.App.4th 1, 27.) Nonetheless, we review it on the merits in the interests of justice and to prevent an ineffective assistance of counsel claim.

criminal history. His 1993 prior strikes were for raping a 20-year-old female job applicant, and on a separate occasion, molesting a young girl under age 14. As part of the same case, appellant pled guilty to misdemeanor sex offenses against two other young girls. In 1986, he was convicted of felony battery causing infliction of serious bodily injury (§ 243, subd. (d)). In 1988, he was convicted of forging an access card (§ 484f). In 1996, he was convicted of second degree burglary (§ 460, subd. (b)), using an access card to obtain items of value without the consent of the cardholder (§ 484g), forging an access card (§ 484f), receipt of stolen property (§ 496, subd. (a)), and grand theft (§ 487, subd. (a)). Given appellant's extensive criminal history, which includes violent crimes and sex offenses, he has failed to establish the requisite disproportionality under the Eighth Amendment.

We also reject appellant's reliance on the recent decision in *Ramirez v. Castro* (9th Cir. 2004) 365 F.3d 755. In that case, the defendant's third strike was a "wobbler" felony conviction of petty theft with a prior based on his theft of a $200 video cassette recorder. His two prior strikes were two second degree robbery convictions based on nonviolent shoplifting offenses obtained through a single guilty plea. (*Id.* at p. 756.) The Ninth Circuit held that the 25-year-to-life term imposed for the third strike constituted cruel and unusual punishment under the Eighth Amendment. Although the fact that the two strike priors were obtained through a single guilty plea was mentioned by the court in its Eighth Amendment analysis, its holding was based on numerous factors including that the current strike and the two strike priors were nonviolent shoplifting offenses, the defendant had no other criminal history, and he had never been to prison. (*Id.* at pp. 768-770.)

In addition, as we noted previously, decisions of the intermediate federal courts are not binding on this court. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1292.) Moreover, *Ramirez* is distinguishable because appellant's current and prior strikes involved serious and/or violent offenses, he had an extensive criminal history and had served time in prison. Unlike *Ramirez*, which found that "neither the 'harm caused or threatened to the victim or society' nor the 'absolute magnitude' of Ramirez's three

shoplifts justifies the [three strikes] sentence in this case" (*Ramirez v. Castro, supra,* 365 F.3d at p. 770), the seriousness of appellant's current and prior offenses justifies the sentence imposed under the three strikes law. Considering appellant's lengthy and serious criminal history and this state's interest in punishing repeat offenders, his sentence of 175 years to life was not grossly disproportionate to his offense and does not violate the Eighth Amendment's proscription against cruel and unusual punishment.

VI. *There Is No Contract Clause Violation*

Finally, appellant contends that retroactive application of the three strikes law (enacted in 1994) to his 1993 plea bargain in which he pled nolo contendere to rape and lewd acts with a minor under age 14 violates the federal and state constitutional prohibitions against laws which impair the obligation of contracts. (U.S. Const., art. I, § 10, cl. 1; Cal. Const., art. I, § 9.) Appellant argues that "[i]mplicit in [his] 1993 plea bargain was the implied promise that, under [section] 667 and under the pre-*Furhman* rule, that only one recidivist penalty could be imposed for a group of felony convictions, when those felonies were brought and tried together."

Appellant concedes that the Sixth District recently rejected a similar claim in *People v. Gipson* (2004) 117 Cal.App.4th 1065. In that case, the defendant argued that his 1992 plea bargain was a contract between him and the state which the Legislature could not impair by subsequent enactment of the three strikes law. He asserted that his plea bargain incorporated by reference former section 667 which provided a recidivist penalty of five years for each prior serious felony and a one year enhancement for each prior prison term, and the bargain was limited to those terms. (*Gipson*, at p. 1068) In rejecting the argument, *Gipson* noted that the prohibitions of both the state and federal contracts clauses " ' "must be accommodated to the inherent police power of the State 'to safeguard the vital interests of its people.' " [Citation.] . . ." [Citation.]" (*Id.* at p. 1069) "Consequently, contracts are 'deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy. . . .' [Citation.]" (*Id.* at p. 1070.) *Gipson* held that the enactment of the three strikes law did not affect the defendant's

1992 plea bargain in that it did not create or destroy any substantive rights the defendant had in the plea bargain. It reasoned that after the plea bargain the law was amended, the defendant committed another offense and therefore became subject to the penalty described in the amended sentencing statute. "The increased penalty in the current case had nothing to do with the previous case except that the existence of the previous case brought [the] defendant within the description of persons eligible for a five-year enhancement for his prior conviction on charges brought and tried separately." (*Ibid.*) *Gipson*'s reasoning and result are applicable in this case. Neither the enactment of the three strikes law nor its interpretation by the Supreme Court in *Fuhrman* affected appellant's 1993 plea bargain. That plea bargain must be " 'deemed to incorporate and contemplate . . . the reserve power of the state' " to enact the three strikes law in an effort to promote public safety by curbing criminal recidivism, a goal clearly in pursuit of " 'the public good and in pursuance of public policy. . . .' [Citation.]" (*Gipson*, at p. 1070; accord, *People v. Castello* (1998) 65 Cal.App.4th 1242, 1251.) No contract clause violation is demonstrated.

DISPOSITION

The judgment is affirmed.

SIMONS, J.

We concur.

STEVENS, Acting P.J.

GEMELLO, J.